Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DOUGLAS ALAN JARVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a defendant's due process rights under *Brady v. Maryland* are violated by the government's failure to disclose documents establishing his two year long cooperation with government agents in narcotics investigations immediately preceding the charged narcotics offense?

II. Whether a defendant's Sixth Amendment right to effective assistance of counsel is violated by counsel's failure to reasonably investigate and present an innocent intent or public authority defense supported by, *inter alia*, the defendant's documented two year long cooperation with government agents in narcotics investigations immediately preceding the charged narcotics offense?

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The unpublished opinion of the United States Court of Appeals, Eleventh Circuit, affirming the district court's denial of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence, is reproduced in the Appendix (hereinafter "A") at page 1. The underlying judgment of the district court, adopting the Magistrate's Report and Recommendation to deny Petitioner's motion is reproduced at A-22. The Magistrate's Report and Recommendation is reproduced at A-2-21.

JURISDICTION

The judgment to be reviewed was entered on December 17, 1998. A-1. Jurisdiction is conferred on this Court by 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Counsel Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

* * *

STATEMENT OF THE CASE

A. Procedural History

Following a hung jury resulting in a mistrial, a second Southern District of Florida jury found Mr. Jarvis guilty of conspiracy to possess with intent to distribute cocaine from January 19 through 22, 1990, and not guilty of attempted possession of cocaine during this same time period. A-2. Jarvis was sentenced to 240 months imprisonment. *Id.* The Eleventh Circuit Court of Appeals affirmed in an unpublished opinion. *United States v. Jarvis*, 978 F.2d 720 (11th Cir. 1992) (table). (A-1). This Court denied review. *Jarvis v. United States*, 113 S.Ct. 3046 (1993).

Approximately seven months following Jarvis's Florida conviction, a Norfolk Virginia federal grand jury charged him and four codefendants with, *inter alia*, conspiracy to distribute, and possess with intent to distribute, cocaine from June, 1988, through the April 25, 1991, filing of the indictment. Although the jury was unable to reach a verdict on several substantive counts, Mr. Jarvis was found guilty of the conspiracy and other substantive counts.[1]

On direct appeal, the Fourth Circuit vacated Mr. Jarvis's conspiracy conviction on double jeopardy grounds concluding that the government had prosecuted him for essentially the same offense for which he had

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[1] The Southern District of Florida magistrate recited that Mr. Jarvis was convicted in Virginia on all counts. A-3. She was wrong about this and several other record facts.

been prosecuted and convicted in the Southern District of Florida. *United States v. Jarvis*, 7 F.3d 404, 408-13 (4th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994). The court, however, affirmed his conviction on the remaining counts.[2]

In September, 1995, Mr. Jarvis filed his 28 U.S.C. section 2255 Motion to Vacate, Set Aside, or Correct Sentence regarding his Florida conviction. Jarvis alleged, *inter alia*, that the government had violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a series of documents demonstrating his cooperation with Virginia and federal authorities in narcotics investigations over nearly a two year period up until shortly before his Florida arrest. A-3-4. He also asserted a denial of his Sixth Amendment right to effective assistance of counsel by virtue of his trial attorney's failure to adequately investigate, and present, an innocent intent or public authority defense. *Id.*

Following extensive briefing, A-4, and an evidentiary hearing at which Jarvis introduced the recently obtained documents establishing his cooperation in various federal and Virginia narcotics investigations, A-13, the magistrate judge recommended denying the motion. A-20. She concluded that the documents failed to support a claim that Jarvis was working under a grant of public authority because (1) the Virginia authorities' conferral of only transactional immunity in February, 1988, did not bar the

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[2] Upon remand, the district court reinstated Jarvis's original 262 month sentence. The resentence was affirmed by unpublished opinion. *United States v. Jarvis*, 41 F.3d 1504 (4th Cir. 1994) (table), *cert. denied*, 514 U.S. 1113 (1995).

Florida court's use of any of Jarvis's subsequent statements; (2) the other documents established cooperation up through only October, 1989, three months before Jarvis's Florida arrest; and (3) Mr. Jarvis's written agreement prohibited engaging in narcotics transactions not specifically directed by his Special Investigation Unit supervisor. A-14-16. Additionally, the magistrate ruled that the ineffective assistance of counsel claim should be denied because defense counsel "*did* investigate the possibility of . . . a[n innocent intent or public authority] defense and rejected it as not viable." A-18. The magistrate concluded that this determination was reasonable based on what Jarvis had told defense counsel. A-18-19.

The district court adopted the magistrate's Report and Recommendation. A-22. The Eleventh Circuit Court of Appeals affirmed in an unpublished opinion. A-1.[3]

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[3] Mr. Jarvis filed a 28 U.S.C. section 2255 motion to vacate his Virginia conviction based on similar violations of his due process and effective assistance of counsel rights. Although that district court intimated its belief that Jarvis's discovery rights had been violated by the Florida prosecutors' failure to turn over the documents reflecting his cooperation, the court denied the motion finding that it failed to establish any discovery violation on the part of the Virginia prosecutors. This ruling was affirmed by an unpublished opinion. *United States v. Jarvis*, 162 F.3d 1157 (4th Cir. 1998) (table). Jarvis's Petition for Writ of Certiorari is pending in this Court. *Jarvis v. United States*, No. 98-1397 (March 1, 1999).

B. Facts

1. The Trial

Jarvis's conviction arose out of his connection with a federal reverse sting investigation in which a government informant had sought to sell several kilograms of cocaine to a Miami cocaine dealer. The evidence consisted almost entirely of transcripts of conversations between the informant and the cocaine dealer. Halfway through the negotiations the cocaine dealer identified Jarvis as a potential buyer.

Negotiations as to quantity, price, and terms continued through the afternoon of January 22nd at which time, after a fourth party with cash was brought into the negotiations, a meeting to consummate the sale was arranged at a Fort Lauderdale motel. Jarvis was not present for the final negotiation but was ultimately "escorted" into the room by the DEA agent who was posing as the seller. Shortly afterwards, when agents stormed the room to make the arrests, Jarvis had no money on his person. He had not touched the cocaine.

In a post-arrest statement to the arresting agent, Jarvis explained that he was an informant for the Virginia Beach Police Department. A-6. Although he explained that lieutenant Mullen, for whom he was working, was not aware that he was in Florida, Jarvis invited the agent to contact Mullen. A-5. The agent claimed that Jarvis also stated that he had planned to take the three kilos back to Virginia Beach where he would turn over two to the police for whom he was working and sell one for his own profit.

Jarvis testified that he was in a legitimate business with the cocaine dealer selling replica watches and other products. The cocaine dealer, however, owed Jarvis $1,800. Coached by the cocaine dealer, Jarvis agreed to pose as a wealthy drug buyer from up north in order to assist her to consummate the drug deal so that she could repay the debt she owed him. Jarvis also testified that he had previously worked as an informant for Virginia Beach police officer Mullen.

2. The Motion to Vacate Hearing

At the 2255 hearing, Jarvis's trial attorney admitted that, though he knew Jarvis had been cooperating with federal and Virginia law enforcement officers, and that Mullen had been identified to him, he never spoke to Mullen or subpoenaed documents establishing Jarvis's two year long relationship with law enforcement. A-5. He testified that he did not believe a public authority defense was viable because Jarvis's relationship with the Virginia Beach Police Department preceded his activities in Florida and that Jarvis had told him that he was not in Florida at the time of his arrest for the specific purpose of conducting an investigation for that agency. A-5-6.

At the hearing, Jarvis introduced the recently obtained documents that established his nearly two year long relationship with federal and Virginia law enforcement extending through shortly before his Florida arrest. Those documents included:

- An FBI 302 report dated February 11, 1988, in which Jarvis was conferred transactional immunity and detailed his narcotics activities

and those of many other Florida and Virginia residents throughout the prior ten years.

- Several FBI 302 reports from April, 1988, reflecting information Jarvis provided regarding a Deputy United States Marshal who was suspected of illegal conduct.

- FBI 302 reports from December, 1988, and January, 1989, reflecting recent information Jarvis provided about other local narcotics users and traffickers and his agreement to wear a body bug for the purpose of recording conversations with a target regarding suspected narcotics trafficking.

- An October, 1989, search warrant affidavit reflecting information provided by Jarvis in which Virginia Beach lieutenant Mullen vouched for his credibility.

- Jarvis's October 6, 1989, Confidential Informant Agreement with the Virginia Beach Police Department and an activity log reflecting information obtained from Jarvis regarding cocaine trafficking in Florida.

- An April, 1990, federal forfeiture affidavit further reflecting Jarvis's cooperation from June through October, 1989, with Mullen and federal agents in a narcotics investigation.

See A-13.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Court of Appeals, by affirming the district court's approval of the Magistrate's Report and Recommendation, has construed the government's *Brady* obligations in an unduly narrow fashion which conflicts with the decisions of this Court.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that due process requires the government to disclose all evidence favorable to an accused when such evidence is material to guilt or punishment. *Id.* at 87. In *United States v. Agurs*, 427 U.S. 97 (1976), this Court clarified that the government's disclosure obligation arises regardless of whether the defendant specifically requested the favorable evidence. *Id.* at 107-11. Furthermore, failure to disclose violates a defendant's due process rights whether or not the prosecutor acted in good faith. *Brady* at 87.

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court held that evidence is material if there is a reasonable probability that disclosure of it would have changed the outcome of the proceeding. *Id.* at 682. This standard is not met by "[t]he mere possibility that . . . undisclosed information *might* have helped the defense . . . ." *Agurs* at 109 (emphasis added). However, nor does the standard require a showing that disclosure of the suppressed evidence *more likely than not* would have resulted in acquittal. *Kyles v. Whitney*, 514 U.S. 419, 115 S.Ct. 1555, 1566 (1995). The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Thus, a defendant need only show that "the favorable evidence could reasonably be taken to put

the whole case in such a different light as to undermine confidence in the verdict." *Id.* Determination of a violation must take account of the cumulative effect of the suppressed evidence in light of other evidence, not merely the probative value of the suppressed evidence standing alone. *Id.* at 1567. *See United States v. Pelullo*, 105 F.3d 117, 123 (3rd Cir. 1997) (*Brady* violation because *cumulative* effect of non-disclosed impeachment evidence resulted in verdict unworthy of confidence); *Smith v. Secretary Dept. of Corrections*, 50 F.3d 801, 834 (10th Cir. 1995) (*Brady* violation because disclosure of suppressed evidence taken cumulatively might have led to different result even if some evidence insignificant when standing alone).

The documentary evidence which the government withheld from Jarvis provided a substantial basis for a "public authority" defense. By this defense, a defendant "seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in covert activity." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994):

> The validity of this defense depends upon whether the government agent in fact had the authority to empower the defendant to perform the acts in question. If the agent had no such power, then the defendant may not rest on the "public authority"; reliance on the *apparent* authority of a government official is not a defense in [the Eleventh C]ircuit because it is deemed a mistake of law, which generally does not excuse criminal conduct. A defendant legitimately may rely, however, on a government

> official's real authority to authorize the defendant's conduct. Actions properly sanctioned by the government are not illegal.

Id. (citations omitted). *Accord United States v. Lopez-Lima*, 738 F.Supp. 1404, 1408 & n.5 (S.D. Fla. 1990).

The documents also provided strong support for an "innocent intent" defense. This defense contemplates a defendant asserting "that he lacked criminal intent because he honestly believed he was performing the otherwise-criminal acts in cooperation with the government. 'Innocent intent' is not a defense *per se*, but a defense strategy aimed at negating the *means rea* for the crime, an essential element of the prosecution's case." *Baptista-Rodriguez* at 1368 n.18.

When a prosecutor fails to disclose arguably favorable evidence, he or she undertakes the risk that such evidence, placed in context and in light of the other circumstances of this case, might establish a substantial defense that if not presented, would undermine confidence in the jury's verdict. As this Court explained in *Kyles*:

> While the definition of . . . materiality in terms of the cumulative effect of suppression must . . . be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely

> net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . , the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id., 115 S.Ct. at 1567-68 (citations omitted).

By failing to disclose the documents which Mr. Jarvis obtained shortly before his 2255 hearing, the government undertook the risk that they might rise to the level of the "reasonable probability" that would undermine confidence in the verdict reached without their disclosure. The documents evidenced a substantial course of cooperation between Jarvis on the one hand, and federal agents and Virginia Beach police lieutenant Mullen, on the other hand. They provided a firm foundation for a "public authority" or "innocent intent" defense. *See Baptista-Rodriguez*, 17 F.3d at 1368 n.18.

Although in recommending denial of Mr. Jarvis's *Brady* claim, the magistrate relied on the fact that Jarvis was conferred only transactional immunity in February, 1988, A-14, this did not address the exculpatory nature of *the entire series of documents* establishing cooperation that *only began* in 1988. This nearly two year long course of dealing between Jarvis and federal and Virginia law enforcement officers, A-13, provided a strong basis to argue that Jarvis's connection to any narcotics activities during this period of time was based on the public

authority to which he was reporting and on whose behalf he was acting.

That the last document reflecting this public authority was generated approximately three months before Jarvis's Florida arrest in no way defeated the exculpatory nature of these documents. *See United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985) (conviction vacated based on government's failure to disclose documents evidencing defendant's prior cooperation arrangement with government). Mullen testified that he never terminated his cooperation relationship with Jarvis. Although there was a procedure for terminating relationships with informants called "blackballing," Mullen never invoked this procedure. A-10.

Although, as the magistrate noted, Jarvis's Confidential Informant Agreement indicated that he could not engage in any unauthorized transactions, A-10, 15, as Mullen admitted at the 2255 hearing, Jarvis had been rewarded previously for an unauthorized transaction by being documented as an informant and being reimbursed for monies expended in the unauthorized transaction. Additionally, Mullen knew Jarvis was trafficking in drugs while Jarvis was cooperating and told him so. Mullen did not blackball Jarvis for this. Thus, there was nothing in the record to negate the inference that Jarvis's Florida activities leading to his arrest also would have been ratified by Mullen.[4]

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[4] As another reason for denying Mr. Jarvis's *Brady* claim, the magistrate noted trial counsel's testimony that Jarvis told him he was not acting on behalf of law enforcement while in Florida. A-16. Obviously, whatever Jarvis may have told

The government's non-disclosure of documents establishing Jarvis's nearly two year long cooperation in federal and Virginia narcotics investigations – approved by the district court and condoned by the Eleventh Circuit Court of Appeals – raises an issue at the heart of a defendant's due process rights at trial: the obligation of the government to turn over material exculpatory evidence. The Eleventh Circuit's *per curiam* opinion clearly condones a reading of the government's *Brady* obligation that is contrary to *Brady* and its progeny. If allowed to stand, this small step may lead to the further erosion of this fundamental aspect of due process. To prevent any further diminution of this right and to return the Eleventh Circuit to the path paved by *Brady*, this Court should review this case and vacate Mr. Jarvis's conviction.

II. The Eleventh Circuit Court of Appeals, by affirming the district court's approval of the Magistrate's Report and Recommendation, has construed the obligation of defense counsel under *Strickland v. Washington* so as to undermine counsel's fundamental responsibility to *thoroughly* investigate all available defenses and to make *reasonable* strategical decisions based on that investigation.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established a two-prong test to evaluate ineffective assistance of counsel claims. To obtain reversal of a

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defense counsel had no bearing on the government's duty to disclose the documents evidencing Jarvis's relationship with law enforcement.

conviction, a defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. *Id.* at 687-88. Although under the performance prong, *Strickland* established a "strong presumption" that counsel's trial tactics fell "within the wide range of reasonable professional assistance," *id.* at 689, such tactics must be based upon thorough investigation of the facts and law. Accordingly, counsel's trial tactics are reasonable precisely to the extent that they are supported by a proper investigation of the law and facts. *Id.* at 690-91. *See, e.g., Williams v. Washington*, 59 F.3d 673, 679-83 (7th Cir. 1995) (ineffective assistance when counsel failed to read letter written by victim of sexual assault detailing incident, interview witnesses bolstering defendant's credibility, or visit scene of alleged assault); *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994) (ineffective assistance when counsel failed to investigate alibi witnesses and eyewitnesses).

The district court concluded, and the Eleventh Circuit agreed, that defense counsel did investigate an "innocent intent" and "public authority" defense. A-18. However, defense counsel admitted that he never subpoenaed the documents that would have substantiated Jarvis's claim that at the time of his Florida arrest, he was a confidential informant for Virginia Beach police lieutenant Mullen. A-5. Likewise, although Mullen was present at Jarvis's trials, defense counsel admitted that he never sought to interview Mullen either on these occasions or prior to the first trial. *Id.* Such conduct hardly constituted

adequate investigation under *Strickland* upon which to base "an intelligent and knowledgeable," A-18, rejection of these well-supported defenses.

At the 2255 hearing, defense counsel testified that he had "considered," but rejected, an "immunity defense." A-5. Although the matter of whether Jarvis was conferred on-going use immunity during the course of his cooperation is open to question, there was no question that the February, 1988, agreement between Jarvis and Virginia prosecutors, found by the Fourth Circuit Court of Appeals to have conferred only transactional immunity, would not have provided a defense to Mr. Jarvis in itself. This, however, was irrelevant to establishing an "innocent intent" or "public authority" defense. This agreement did, however, signal the beginning of the substantial cooperation relationship between Jarvis and law enforcement that constituted the seed to a successful innocent intent or public authority defense.

The district court, and the Eleventh Circuit by its affirmance, also relied upon defense counsel's determination that any "innocent intent" or "public authority" defense was not viable unless Jarvis testified and that any testimony from Jarvis to support these defenses would have been perjurious. A-19. Neither assessment was reasonable under the facts and circumstances of this case. First, though defense counsel testified that Jarvis told him he was not in Florida to do anything for the Virginia Beach Police Department, A-6, this statement did not undermine either defense. Consistent with this statement and his post-arrest statement to law enforcement, Jarvis could have explained the on-going nature of his relationship with law enforcement, the fact that his relationship

had never been terminated and he had never been "blackballed," A-10, and the fact that Mullen had previously ratified another "unauthorized" narcotics transaction. Given these facts, Jarvis could have testified that he honestly believed that his Florida conduct was within the scope of his "cooperation with the government" and that he had relied on the authority of Mullen "to engage him in [this] covert activity." Such testimony would not have been perjurious and fully would have supported either an "innocent intent" or "public authority" defense. *See Baptista-Rodriguez*, 17 F.3d at 1368 n.18. Also contrary to defense counsel's assessment, even if Jarvis did not testify, the documents introduced at the 2255 hearing and the explanatory testimony of Mullen developed on cross-examination would have provided an ample basis to argue these theories to the jury.

Examining the "totality of the circumstances," counsel's judgment in rejecting these defense theories in favor of the defense utilized at trial appears even more clearly unreasonable. At trial, defense counsel elicited from Jarvis that he acted to assist the Miami cocaine dealer with the intent to facilitate the cocaine transaction. This testimony was tantamount to a directed verdict of conviction. Particularly given this fatal alternative, defense counsel's rejection of the other defenses was unreasonable. *See Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994); *Reyes-Vasquez v. United States*, 865 F.Supp. 1539, 1543 (S.D. Fla. 1994).

Although this Court in *Strickland* refrained from setting forth a "set of detailed rules for counsel's conduct," it emphasized that "thorough investigation of law and facts relevant to plausible options" is the baseline duty of

all defense counsel. *Strickland*, 466 U.S. at 690-91. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Ultimately, the Eleventh Circuit Court of Appeals abandoned this formula in affirming the district court's decision. Its ruling denied Mr. Jarvis the adversarial testing of the government's case to which he was entitled. It threatens to dilute the baseline obligation of counsel to thoroughly investigate set forth in *Strickland*.

CONCLUSION

For these reasons, the Petitioner respectfully prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5907

D. C. Docket No. 90-6099-CR-JCP
No. 95-6917-CV-JCP

DOUGLAS ALAN JARVIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

(Filed Dec. 17, 1998)

Appeal from the United States District Court
for the Southern District of Florida

(December 17, 1998)

Before ANDERSON and DUBINA, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* Eleventh Circuit Rule 36-1.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DOUG ALAN JARVIS, Movant, v. UNITED STATES OF AMERICA, Respondent.	:	CASE NO. 95-6917-CIV-PAINE 90-6099-CR-PAINE **REPORT AND RECOMMENDATION**

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. § 2255, which was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

I. PROCEDURAL HISTORY

The movant was charged in a two-count indictment with conspiracy and attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, based on conduct occurring in January 1990. The movant first proceeded to trial in October 1990, but that trial ended in a mistrial when the jury was unable to reach a verdict. The movant was retried the following month, and on November 16, 1990, the jury found the movant guilty of conspiracy (Count I), but not guilty of attempt (Count II). The movant was sentenced to 240 months imprisonment, followed by eight years of supervised release. His conviction was affirmed by the Eleventh Circuit Court of

Appeals, and the United States Supreme Court denied certiorari.

Following the movant's conviction in this district, he was tried and convicted on all counts of an indictment filed against him in the Eastern District of Virginia. That indictment charged conspiracy to traffic in cocaine, seven counts of possession of cocaine with intent to distribute, and five counts of traveling in interstate commerce to promote an unlawful activity. The movant appealed his convictions, and the Fourth Circuit Court of Appeals reversed the movant's conviction on the conspiracy count on double jeopardy grounds, holding that the movant had been convicted of the same conspiracy in this district. The appellate court affirmed the movant's convictions on the substantive charges. *United States v. Jarvis*, 7 F.3d 404, 406 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1200 (1994).

In his *pro se* motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255, the movant alleged that he was denied his right to effective assistance of counsel at trial. The movant argued that his trial lawyer, Edward O'Donnell, Esquire, erred in failing to: (a) challenge the use of immunized testimony before the grand jury; (b) assert a defense of reliance on public authority or entrapment by estoppel; (c) permitting the Government to utilize conflicting transcripts and conflicting versions of the movant's post-arrest statements, and (d) to ensure that the jury was properly instructed. The movant also alleged that the prosecutor was guilty of misconduct by (a) placing him twice in jeopardy for the same offense by charging him in this district and in Virginia; (b) failing to comply with discovery obligations

and (c) making improper closing argument by commenting on facts not in evidence and vouching for Government witnesses.

Counsel was appointed to represent the movant and an evidentiary hearing was conducted. Counsel for the movant filed a memorandum in support of the motion and request for evidentiary hearing, a hearing memorandum, two post-hearing memoranda of law and a reply to the Government's response to the post-hearing memorandum. Counsel asks this Court to consider the following claims made by the movant: (1) his right to due process of law was violated by the Government's failure to provide in discovery documents which disclosed the movant's past relationships with law enforcement agencies in Virginia; (2) he was denied his right to effective assistance of counsel at trial because his lawyer failed to investigate and argue the defense of innocent intent and public authority/entrapment by estoppel; (3) his lawyer was ineffective in failing to request that the jury be instructed on the law pertaining to multiple conspiracies and the impossibility of conspiring with Government agents, and (4) the movant was denied his right to effective assistance of counsel at sentencing because his lawyer did not argue that the movant should have been sentenced based on two or three kilograms of cocaine, rather than five.

II. FACTS PRESENTED

Edward J. O'Donnell, Esquire, testified that he has been a criminal defense lawyer for twenty-six years, and was retained to represent the movant at both trials in this district. He recalled that the charges arose in connection

with a trip from Norfolk, Virginia, to Florida, taken by the movant and his girlfriend in the movant's parents' Cadillac. The movant intended to collect some money from a Latin man, who owed the movant funds generated by a fake Rolex watch business. The movant's defense was that he was not in Florida to do a drug deal, and Mr. O'Donnell presented evidence in support of that defense. Mr. O'Donnell also attempted to introduce evidence that the movant had withdrawn from the alleged drug conspiracy.

Mr. O'Donnell recalled that the movant had made post-arrest statements regarding his work for a detective with the Virginia Beach Police Department, who was attached to a federal task force. In one of these statements, the movant suggested that the officer who had arrested him in this district call the detective in Virginia Beach to verify that the movant had worked as an informant. Prior to trial, Mr. O'Donnell met with the movant's brother-in-law, Doug Kirch, and all other members of the movant's family, except for the movant's sister.

Mr. O'Donnell did not contact the Virginia Beach detective or subpoena him to testify at the movant's trial. However, Mr. O'Donnell recalled that the detective was at the courthouse during the movant's first trial. Mr. O'Donnell did not try to obtain any documents from the Virginia Beach Police Department or the FBI.

On cross examination by the prosecutor, Mr. O'Donnell explained that he had considered a defense based on an immunity or cooperation agreement between the movant and law enforcement authorities in Virginia. He had discussed this possibility at some length with Doug

Kirch. However, Mr. O'Donnell concluded that such a defense was not viable because of the time periods involved. When Mr. O'Donnell saw Detective Mullen from the Virginia Beach Police Department at the movant's first trial, he asked the movant whether he wanted to call the detective as a witness. A decision was made not to call the detective as a witness, and Mr. O'Donnell was relieved that he was not called by the prosecution.

In response to questions posed by the undersigned, Mr. O'Donnell elaborated on his testimony pertaining to the decision not to present a defense based on public authority or immunity. He testified that the movant's relationship with the Virginia Beach Police Department had preceded the activities alleged in the Florida indictment. Moreover, the movant had told Mr. O'Donnell that he was not in Florida to do anything for the Virginia Beach Police Department.

On redirect examination by counsel for the movant, Mr. O'Donnell reviewed a copy of the movant's post-arrest statement. In that statement, the movant told Florida agents that he had been working as a confidential informant for the Virginia Beach Police Department, whom he had notified that he was going to Florida and take possession of the three kilo bags. Mr. O'Donnell reiterated that this was *not* what the movant had advised him about his activities.

The undersigned questioned Mr. O'Donnell on this redirect examination, as follows:

THE COURT: Is it your testimony that what your client told you was different from what is set forth in that . . . statement?

WITNESS: Yes.

* * *

THE COURT: As a trial lawyer, do you think it would be viable to present a public authority defense without having your client testify? Is that something that would have been possible?

WITNESS: . . . . Maybe we could have called the agent ourselves in our case in chief, if his statement would be admissible on our side of the case.

The Government would have objected.

THE COURT: I'm wondering if it was a viable strategy to present that defense without calling your client?

WITNESS: Viable, no. Could you do it? I would say yes.

THE COURT: If you were to call your client as a witness, from what I understand your testimony to be on that defense, he could not truthfully present it. Is that accurate?

WITNESS: Based on my conversation with him that is accurate.

(Transcript of Evidentiary Hearing, December 9, 1996, at 36-37.)

Douglas Kirch, the movant's brother-in-law, also testified as a witness for the movant. He stated that he had discussed various possible defenses with Mr. O'Donnell prior to the movant's first trial, including the movant's

working as an informant with the FBI and the Virginia Beach Police Department. Mr. Kirch did not urge Mr. O'Donnell to pursue any particular defense.

After the movant's first trial, Mr. Kirch again discussed with Mr. O'Donnell the strategy that was to be utilized at the retrial. Mr. O'Donnell determined that it was best to use the same defense, since the first trial had ended in a hung jury. Mr. Kirch also testified that he had spoken to some of the jurors who had deliberated at the first trial, who felt that there was something lacking in the Government's case.

Lieutenant Gregory G. Mullen of the Virginia Beach Police Department testified that from March 1987 until May 1990 he was assigned to the Special Investigative Division (SIU), which was involved in narcotics investigations. Lieutenant Mullen frequently worked with confidential informants and was familiar with the informant agreements that were utilized. He read the following provision from the agreement that had been signed by the movant. Movant's Exhibit 5.

> In agreeing to work with the Special Investigative Unit I understand that no unit investigator will make any explicit or implicit promises or predictions regarding the likely disposition of any criminal proceeding that [are] pending against me, but that unit investigators will make their best efforts to arrange a meeting with prosecutorial authorities at which time such matters can be discussed.

(Transcript of Hearing, December 11, 1996, at 18-19.) Lieutenant Mullen also identified a copy of the SIU Procedure Manual which detailed the procedure for blackballing an informant.

Lieutenant Mullen testified that in 1988, he became involved in an investigation of the movant and his associates. In connection with that investigation, he worked with an FBI agent named Chuck Porucnik, who was the case agent. Lieutenant Mullen first met the movant in March or April of 1989, when the movant expressed a desire to cooperate for the benefit of his girlfriend, Katherine Parker.

Lieutenant Mullen stated his relationship with the movant began in September 1989, and continued for approximately six weeks. During that time, the movant provided him with information on four individuals who were associates of the movant in the drug business. However, Lieutenant Mullen told the movant that he was gathering information on him, and planned to charge the movant as soon as he had sufficient evidence.

In the course of his cooperation, the movant purchased drugs from one Terry Barrett, who had obtained them from Lynn Swearingen. The movant also provided information on Swearingen's source of supply, an individual named Larry Jensen. Based in part on the movant's information, a search warrant was obtained which led to Swearingen's arrest. Jensen was arrested based on information unrelated to that provided by the movant.

Lieutenant Mullen explained that the movant was documented as an informant as a result of the drug buy

from Barrett. However, after that time, the movant stopped calling him, and Lieutenant Mullen assumed that the movant had terminated the relationship. Lieutenant Mullen did not blackball the movant, a procedure which is to be used if the informant is jeopardizing the safety of an officer or has provided false information. Lieutenant Mullen conceded that he had learned that the movant was dealing in drugs at the time of his cooperation.

During cross examination by the prosecutor, Lieutenant Mullen testified that he never gave the movant permission to engage in drug purchases without prior authorization. He stated that the movant only purchased drugs on behalf of the Virginia Beach Police Department on one occasion that being in October 1989. The movant's cooperation continued for approximately two weeks after the informant agreement was signed.

Lieutenant Mullen explained that the agreement signed by the movant precluded him from engaging in drug deals without prior authorization by a unit investigator, and Lieutenant Mullen did not give the movant verbal permission to engage in any activities without prior authorization. In fact, it was as a result of the movant's unauthorized purchase of drugs from Barrett that Lieutenant Mullen determined to sign up the movant as an informant. At that time, Lieutenant Mullen instructed the movant that a drug purchase had to be properly set up ahead of time. Lieutenant Mullen did not at any time authorize the movant to travel to Florida to purchase drugs.

Lieutenant Mullen testified that he did not provide the FBI or any federal officer with a copy of the informant

agreement signed by the movant until October 1990, at the time of the movant's first trial in this district. Lieutenant Mullen also stated that he did not arrest the movant in 1989 because the prosecutor determined that additional evidence was needed.

During questioning by the undersigned, Lieutenant Mullen provided the following testimony:

> THE COURT: All right. Did Mr. Jarvis make any purchases or sales of cocaine [other] than this one you talked about that he did without your authorization?
>
> THE WITNESS: No.
>
> THE COURT: The person from whom he purchased the cocaine in October of 1989 which led to or was followed by your signing of the agreement, was that individual prosecuted?
>
> THE WITNESS: No, ma'am.
>
> THE COURT: Did Mr. Jarvis ever testify in any case in conjunction with his cooperation with you?
>
> THE WITNESS: No.
>
> THE COURT: Did he ever, after October of 1989, call you to advise you that he either had cocaine or had any other information or had engaged in any drug activities?
>
> THE WITNESS: No.
>
> THE COURT: When you had him sign the informant agreement that has been introduced into evidence, did you just give it to him to sign or did you discuss it any way?

THE WITNESS: I gave it to him, told him to read over it, sign it, and if he had any questions I would be glad to discuss it with him.

THE COURT: Did you observe whether Mr. Jarvis appeared to be reading that agreement or not?

THE WITNESS: I know that he did not take it and immediately sign it and hand it back to me. I can't say how long he took to read it. But it wasn't like, I gave it to him, he signed it and handed it right back to me.

THE COURT: Did he appear to be reading it?

THE WITNESS: Yes, Ma'am.

THE COURT: Did he ask you any question before he signed it?

THE WITNESS: No, he did not.

THE COURT: What specifically after the incident where he produced the cocaine for you, what did you tell him regarding how he was to proceed in the future?

THE WITNESS: Even before he signed the agreement we had discussed the way things were supposed to be. That he was supposed to call, let us know what he was going to set up, that we were going to make arrangements, that we would try to surveil the situation and how the buys were supposed to be done. That was even before he signed the agreement

At the time of the signing we discussed that again, that, you know, we only have a limited number of people, everybody has different cases that they are working on, we have to do things

in [a] certain way, and we need to have advance notice so that's the way we have to operate.

THE COURT: Did Mr. Jarvis do anything to cause you to conclude that he did not understand what you were saying?

THE WITNESS: No, Ma'am.

THE COURT: Did he say anything to you in response to what you said?

THE WITNESS: No.

(Transcript of Hearing, December 11, 1996, pp. 58-60.)

The movant and the Government stipulated that the movant had provided information to the United States Marshal Service in December 1988 and January 1989, in connection with an investigation of a deputy Marshal, and the Marshal Service was satisfied with the movant's cooperation. (Transcript of hearing, December 9, 1996, at 64-66, 68.)

The movant introduced into evidence several documents: the Government's response to the Standing Discovery Order in the instant case (Ex. 1); an FBI form 302, detailing an interview of the movant on February 9, 1988 (Ex's 2-2a); an affidavit of Lieutenant Mullen in support of the seizure of a vehicle (Ex. 3); the affidavit in support of the search warrant which led to the arrest of Lynn Swearingen (Ex. 4); the informant agreement signed by the movant in October 1989 (Ex. 5); various FBI reports and notes reflecting information provided by the movant from April 1988 through January 1989 (Ex.'s 6-9a), and a portion of the Virginia Beach Police Department SIU Manual (Ex. 11).

III. RECOMMENDATION OF LAW

A. Discovery Violations (Issue One).

The movant contends that the Government withheld from the defense the documents introduced into evidence as Exhibits 2-9a, which the movant argues constituted evidence favorable to his defense. These documents reflected the movant's cooperation with the FBI from February 1988 until January 1989, and with the Virginia Beach Police Department in October 1989. This cooperation predated January 1990, the date of the events forming the basis of the instant indictment. Exhibits 2 and 2a, dealing with the movant's FBI debriefing in February 1988, recite:

> Prior to conducting the interview, Special Agent (SA) ROBERT J. ARNOLD advised JARVIS that the interview was being conducted predicated upon JARVIS providing complete and truthful details regarding all of his narcotics activities in return for his not being prosecuted by the Norfolk, Virginia, Police Department, or the Federal Government in the Eastern District of Virginia for any activities which he relates to the interviewers during the interview. JARVIS was advised that these conditions had been approved by Assistant United States Attorney ROBERT E. BRADENHAM, II, Eastern District of Virginia, Norfolk, Virginia. JARVIS was further advised that the agreement did not cover any acts of violence and, therefore if he has participated in same, he should not relate those events to the interviewers. JARVIS advised that he understood the conditions of the interview. . . .

(Ex. 2 and 2a, p. 1, par. 2.)

The agreement signed by the movant in October 1989 provided, that the movant was forbidden to:

> A. Sell or deliver any controlled substance, dangerous drug, marijuana, or any substance purported to be same, to anyone, except while acting at the direction of, and under the direct control of a unit (SIU) investigator.
>
> B. Never sell or deliver or cause to be delivered any controlled substance, dangerous drug, marijuana, or any substance purported to be same, to any person who would then in turn sell or deliver said controlled substance, dangerous drug, marijuana, or other substance purported to be same, to any member of the unit or any other person.

(Ex. 5, p. 1.)

In addition, the agreement recited:

> F. I further understand that I may not engage in any illegal or improper conduct so long a [sic] I am working with the Special Investigation Unit.
>
> B. Further, I understand that any violations arising from my actions in violation of the above circumstance will result in an investigation of matters and if the charges are substantiated, appropriate action including the possibility of criminal prosecution will be taken.

Id.

None of the documents introduced by the movant established or even supported a claim that he was working under a grant of immunity or public authority when engaging in the acts which gave rise to the instant

charges. Moreover, the movant has introduced no testimony or other evidence that he lacked criminal intent when committing those offenses. Finally, Mr. O'Donnell testified that the movant told him he was *not* acting on behalf of law enforcement when he traveled to Florida in January 1990.

Under these circumstances, the documents to which the movant refers did not contain evidence favorable to his defense, and would not have established a defense of immunity, public authority or estoppel. Therefore, there was no discovery violation and the movant suffered no prejudice as a result of his failure to receive these documents prior to trial.

B. Ineffective Assistance of Counsel (Issues Two Through Four).

The standards which must be applied in determining what constitutes ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). There the court held that "the proper standard of attorney performance is that of reasonably effective assistance," and that the burden is on the defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. In determining whether the defendant has met this burden,

> . . . a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have

> been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690.

The court in *Strickland* noted that counsel in any criminal case has certain basic duties: a duty of loyalty, to avoid conflicts of interest; a duty to advocate the defendant's cause, to consult with the defendant on important decisions and keep him informed of important developments in the case; and a duty to apply "such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. In determining whether counsel in a particular case adequately performed these duties, the reviewing court must make every effort to "eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time," and the court should apply "a heavy measure of deference to counsel's judgments." *Id.* at 689, 691.

The "burden of proof for showing ineffective assistance of counsel is, and remains, on petitioner throughout a habeas corpus proceeding." *Roberts v. Wainwright*, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also, *Jones v. Kemp*, 678 F.2d 929, 932 (11th Cir. 1982). The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington, supra,* at 694.

The Court then prescribed the analysis to be employed by a reviewing court:

> . . . A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 688-690.

An accused's counsel must be able to present "an intelligent and knowledgeable defense," *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970), but he is not obliged to pursue avenues clearly of no evidentiary value, or avenues he is instructed by his client to pursue. See, *Jones v. Estelle*, 632 F.2d 490 (5th Cir. 1980); *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980); *Mays v. Estelle*, 610 F.2d 296 (5th Cir. 1980).

The movant first contends that his trial counsel was ineffective in failing to investigate and argue the defense of innocent intent or public authority/entrapment by estoppel. Mr. O'Donnell's testimony, which the undersigned deems to be credible, reflects that he *did* investigate the possibility of such a defense and rejected it as not viable.

Tactical decisions of this nature cannot form the basis of a finding of ineffective assistance of counsel. *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983); *Williams v. Wainwright*, 681 F.2d 732 (11th Cir. 1982). Moreover, the undersigned concurs with Mr. O'Donnell's determination that this defense was not viable unless the movant testified regarding his lack of criminal intent and his belief that he was acting on behalf of law enforcement. Based on what the movant had told his lawyer, such testimony would have been perjurious, and Mr. O'Donnell cannot be faulted for refusing to violate his ethical responsibilities as a lawyer. And, for the reasons discussed in the preceding section, there was no documentary support for such a defense.

Next, the movant contends that his counsel erred in failing to seek jury instructions pertaining to multiple conspiracies and to the legal principle that one cannot conspire with a Government agent. As the Government explains in its initial response to the instant motion, there was no evidence at trial to support either instruction. (Response of the United States to Movant's Motion for Relief Pursuant to 18 U.S.C. § 2255, pp. 18-19.)

The movant's final argument, that his lawyer erred in failing to argue at sentencing that the movant should only be held responsible for two or three kilgrams of cocaine, likewise must fail as having no support in the record. As detailed in the Government's post-hearing memorandum of law, there was overwhelming evidence that the movant knowingly participated in conspiracy involving five kilograms of cocaine. (Response by United States to Movant's Post-Hearing Memoranda, pp. 23-28.) The movant has produced no evidence that the case involved only two or

three kilograms, and his argument from the record is not persuasive.

Accordingly, the movant has failed to meet his burden of demonstrating that he was prejudiced by any error committed by his counsel at trial or sentencing, and he is not entitled to § 2255 relief on Sixth Amendment grounds.

IV. CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Motion to Vacate, Set Aside, or Correct Sentence be DENIED.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable James C. Paine, Senior United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1998), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 30th day of September, 1997.

/s/ Lurana S. Snow
LURANA S. SNOW
CHIEF UNITED STATES
MAGISTRATE JUDGE

Copies to:

Mr. Doug Alan Jarvis
AFPD Helen C. Trainor (MIA)
AUSA Anne M. Hayes (ED of NC)
AUSA Dawn Bowen, Chief, Appellate Division (MIA).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-6917-Civ-Paine
90-6099-Cr-Paine

DOUG ALAN JARVIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION

(Filed Oct. 27, 1997)

Upon review of the Report and Recommendation entered on September 30, 1997 by United States Magistrate Judge Lurana S. Snow and upon independent *de novo* review of the record herein, the movant's objections, the findings and recommendations of the Magistrate Judge are approved and adopted, and hereby made the order of this court. Thereupon, it is

ORDERED and ADJUDGED that the Motion to Vacate, Set Aside, or Correct Sentence is denied.

The clerk of Court is directed to close the civil case.

DONE and ORDERED at West Palm Beach, Florida this 25th day of October, 1997.

/s/ James C. Paine
United States District Judge

cc: Mr. Doug Alan Jarvis
U.S. Attorney